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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
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| Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation | ) | No. CS Docket No. 96-60 |
| | ) | |
| Leased Commercial Access | ) | |

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**REPLY COMMENTS**

**OF**

The Disney Channel

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## REPLY COMMENTS OF THE DISNEY CHANNEL

### INTRODUCTION

The Disney Channel ("Disney") has reviewed the large number of comments filed in this proceeding and, as discussed below, joins the numerous commenters who oppose the Commission's proposed leased access rate formula and tier carriage requirement. Disney takes this opportunity, however, to reply to some of the specific assertions made by the commenters who support the Commission's proposals and to specify how the Commission's proposals would adversely affect the public interest generally and The Disney Channel specifically.

### FACTUAL BACKGROUND

The Disney Channel is a 24-hour, satellite-delivered, commercial-free programming service offered to consumers though cable systems and other multichannel video programming distributors such as DBS, SMATV, MMDS, and TVRO. The Disney Channel, which carries entertainment and educational programming designed for children and family viewing, is currently carried by cable systems that serve approximately 95 percent of all cable subscribers in the United States. Disney is received by more than 17 million subscribers, constituting nearly 27 percent of all cable subscribers nationwide.

For many years, The Disney Channel was available to consumers only on an a la carte basis. Disney found, however, that research continually showed that despite extraordinary program satisfaction ratings among subscribers and non-subscribers alike, price was the major obstacle to the purchase of The Disney Channel for many consumers.[1] Thus, Disney developed a marketing strategy aimed at reducing license fees on a per subscriber basis, while preserving the commercial-free, high quality nature of its service. This strategy was to include The Disney Channel on a program tier, thereby resulting in increased subscribership and lower subscriber fees.

During the past five years, therefore, Disney has focused its efforts on persuading cable operators to include The Disney Channel on a tier. Once included on a tier, Disney has spent a significant amount of money to market those tiers to consumers. Those efforts have proven successful. More than 800 cable systems now carry Disney on a tier, permitting 10 million (or 60 percent) of Disney's subscribers to receive The Disney Channel as part of a tier and, therefore, at a substantially lower cost than those subscribers who receive The Disney Channel on an a la carte basis. This strategy has enabled an additional 8.5 million cable subscribers to receive The Disney Channel who did not receive it when it was only offered as an a la carte service on their systems.

Research conducted for Disney demonstrates that consumers receiving The Disney Channel on a tier accord high ratings to both the program service and their cable provider. For example, when The Disney Channel was added to a tier, the number of subscribers who rated the tier an "excellent" value for the money more than *tripled*.[2] Disney's goal, therefore, is to continue its tiering efforts in order to enable the greatest number of viewers as possible to enjoy its high-quality, commercial-free family and children's programming.

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[1] Research conducted for The Disney Channel by C.A. Walker & Associates, 1992.

[2] Research conducted for The Disney Channel by C.A. Walker & Associates, 1995.

## I. THE COMMISSION'S PROPOSED RATE FORMULA WOULD DISSERVE THE PUBLIC INTEREST AND PROVIDE AN UNWARRANTED SUBSIDY TO LEASED ACCESS PROGRAMMERS

The Disney Channel strongly agrees with those commenters who oppose the Commission's proposed rate formula. As many of the commenters point out, the proposed formula provides leased access programmers with a subsidy.[3] Indeed, the formula will not only result in significantly lower rates, but may in some instances result in rates that equal zero.[4]

As the commenters who oppose the Commission's formula cogently explain, these subsidized rates will result in increased demand by leased access programmers (the very purpose of the proposed formula), which in turn will exacerbate an already significant channel capacity problem.[5] Non-leased access programmers like The Disney Channel will find it much more difficult to obtain access to cable systems as cable operators with limited channel capacity are forced to accommodate leased access programmers' increased demand for that channel capacity.[6] (Obtaining access to tiers, which, as noted above, is a high priority of The Disney Channel, will be even more difficult if the Commission also adopts its proposal to allow leased access programmers to demand access to tiers.)

As the comments of those who oppose the Commission's proposed formula note, an increase in the amount of leased access programming will not, per se, serve the public interest.[7] As an initial matter, it is not at all clear that consumers desire more leased access

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[3] *See, e.g.*, Comments of Lifetime Television at 2; Comments of ESPN, Inc. at 2; Comments of NCTA at 10-11. Indeed, the Commission implicitly concedes as much when it proposes to allow rates to return to a market rate once the leased access channels are filled. Further Notice of Proposed Rulemaking ("FNPRM") at ¶¶ 9-10.

[4] *See* NCTA Comments at 12 n.35.

[5] *See, e.g.*, Comments of The Travel Channel at 5-6; Comments of Lifetime Television at 1-2.

[6] Although Disney is available to 95 percent of cable subscribers nationwide, its goal is to be available to 100 percent of subscribers. This additional five percent represents more than three million subscribers.

[7] *See, e.g.*, Comments of The Travel Channel at 3 ("[Leased access] produces programming that consumers do not value.").

programming.[8] If they did, presumably there would currently be more leased access programming available. The availability of leased access programming, like any other type of programming, is a function of demand. If consumers desired programming services like ValueVision, The Game Show Network and Blab TV -- proponents for subsidization -- then cable operators would already be carrying them, and possibly even paying them license fees. In any event, there is no justification -- statutory or otherwise -- for providing leased access programmers, many of which are competing commercial enterprises,[9] with a subsidy and preferential access to a cable operator's most popular tiers. Indeed, such a result would disserve the public interest.

As a number of commenters point out, the Commission's proposed formula does not further Congress' goal in adopting the leased access set aside requirements, which was to increase the amount of programming from sources not affiliated with the cable operators.[10] Although various proponents of the formula (*e.g.*, ValueVision, The Game Show Network and Blab TV) contend that it would enhance diversity, in fact the formula would not likely affect diversity in the manner intended because in all probability it would not affect the carriage of unaffiliated programmers in any measurable respect. As Lifetime Television explains, a channel-locked cable operator is likely to accommodate a leased access programmer by bumping an *un*affiliated non-leased access programmer, rather than an affiliated programmer --

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[8] *See id.; see also* NCTA Comments at 14 ("'Actual experience does not support the assumption that there will be the same number of subscribers and that subscribers would be willing to pay the same amount for leased access programs as for the existing programming.'" (citation omitted)).

[9] *See* Comments of The Travel Channel at 22.

[10] *See* 47 U.S.C. § 532 (the purpose of the leased access provisions is "to assure that the widest possible diversity of information sources are made available to the public from cable systems," by requiring that some channels be set aside for use by "persons unaffiliated with the operator").

resulting, in effect, in a diversity wash.[11] The Disney Channel, as an unaffiliated programmer, thus stands at risk if the Commission adopts its proposal.

For these reasons, The Disney Channel joins the numerous commenters who oppose the Commission's proposed leased access rate formula. While the statute requires cable operators to set aside capacity for leased access channels, it does not require subsidization of leased access programmers so that the capacity is filled.

## II. THE COMMISSION SHOULD NOT ALLOW LEASED ACCESS PROGRAMMERS TO DEMAND ACCESS ON THE BST AND MOST POPULAR CPST

The Disney Channel disagrees with the supporters of the Commission's proposal that access to the BST and most popular CPST is necessary to ensure that the statutory requirements are met. Indeed, the Commission itself concedes that in 1993 it concluded that "Congress did not mandate specific tier or channel location for leased access, as it did for PEG channels."[12] The Commission provides no explanation for its reversal on this issue, and cites no record of abuses leading it to conclude that leased access programmers are being placed on channels to which few subscribers have access.

The Commission's proposal would provide leased access programmers with a preferential access, vis-a-vis non-leased access programmers, that is unwarranted. Non-leased access programmers like The Disney Channel must persuade cable operators that their programming is sufficiently attractive to consumers to warrant placement on a tier -- let alone the most popular CPST. There is no reason why a leased access programming service should be allowed onto a cable operator's most popular CPST regardless of its value to viewers. A cable operator should not be forced to accept programming on a tier -- much less on its most

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[11] Comments of Lifetime Television at 3-4.

[12] FNPRM at ¶ 116; *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* 8 FCC Rcd 5631, 5939 (1993).

popular tier -- when there is other programming that the cable operator determines would make the tier more attractive to consumers.

To be sure, Congress requires cable operators to set aside capacity for leased access programmers. That mandate is satisfied, however, regardless of whether cable operators set aside that channel capacity on the BST, the most popular CPST, another CPST, an NPT or, in some cases, not on a tier at all. Ultimately, it is the television viewer who will be disserved if the Commission mandates where the operator must place leased access programmers, because popular programming will be replaced by less attractive programming.

## III. IF THE COMMISSION ADOPTS A NEW RATE FORMULA, IT SHOULD PROVIDE FOR A THREE-YEAR TRANSITION PERIOD

Disney agrees with the commenters who urge the Commission to provide for a transition period if it adopts its proposed rate formula[13] -- and opposes those who seek immediate implementation of a new formula.[14]

As a number of commenters correctly point out, adoption of the proposed formula will cause major channel displacement.[15] To avoid undue disruption on the part of both consumers and displaced programmers, if the Commission adopts a new rate formula it should also adopt its proposed three-year transition plan. A minimum of three years is required to take implementation past the statutory sunset of rate regulation of the non-basic programming tiers. The Disney Channel already faces an added challenge to obtain tier carriage by virtue of the Commission's rate regulation and going-forward rules that are currently in force. Because the Commission's proposed leased access formula will present still additional hurdles to obtaining

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[13] *See, e.g.*, NCTA Comments at 28; Comments of Lifetime Television at 4; Comments of The Travel Channel at 16-18.

[14] *See, e.g.*, Comments of The Game Show Network, L.P. at 15-18; Comments of ValueVision Int'l, Inc. at 16-22.

[15] *See, e.g.*, Comments of The Travel Channel at 4-8; Comments of ESPN, Inc. at 4-6.

carriage on a tier, fairness dictates that the new formula should, at a minimum, not operate coterminously with the impediments created by rate regulation.

ValueVision's opposition to any transition period, on the ground that it "would protect existing cable programmers -- many of whom are *affiliates* of cable operators,"[16] makes no sense in our view. It is not the affiliated programmers, but the *un*affiliated programmers, who are most likely to be bumped in order to accommodate increased demand by leased access programmers. It is, therefore, entirely reasonable for the Commission to provide these programmers with a transition period in order to "avoid unduly penalizing [them] for decisions . . . that were reasonably based on circumstances created by the Commission's previous rules."[17]

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[16] Comments of ValueVision Int'l, Inc. at 19 (emphasis in original). In making such an argument, ValueVision ignores the fact -- as NCTA cogently points out -- that the 1992 cable legislation, and implementing FCC rules, generally prohibit vertically integrated cable operators from filling more than 40 percent of their channel capacity with affiliated programmers. *See* NCTA Comments at 5; 47 C.F.R. § 76.504.

[17] FNPRM at ¶ 99.

## CONCLUSION

For the foregoing reasons, The Disney Channel joins other cable programmers, as well as cable operators and other commenters, who urge the Commission not to adopt either its proposed formula for setting leased access rates or its proposal to allow leased access programmers access to tiers. If, however, the Commission nevertheless adopts a new rate formula, it should adopt the proposed three-year transition period so that the disruptive effects of the new formula are minimized.

Respectfully submitted,

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